Patrick Samuel a/l Joseph Sebastian v Majlis Peguam Malaysia

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 17–20–04 OF 2013
HASNAH HASHIM J
11 DECEMBER 2013

Legal Profession — Professional discipline — Restoration to the Roll — Application made after three years struck off the Roll — Appellant remorseful for his professional misconduct and truly penitent — Whether there was strong basis for restoration — Conduct of applicant — Whether applicant fit and proper person to resume practice — Whether any time frame to make application — Legal Profession Act 1976 s 107

The applicant, an advocate and solicitor, had set up his own practice under the name and style of Messrs PS Sebastian & Co but had ceased practice in 2003. In the instant application, one Ramasamy a/I Rajagopal ('the complainant') lodged the complaint with the Disciplinary Committee ('DC') vide a letter dated 23 June 2003 for failure by the applicant to release the settlement sum of RM16,500, being the compensation awarded to the complainant. The investigation tribunal ('IT') sent a notice of hearing in 2005 to the applicant's former address in Penang. However, as the applicant was absent at the said hearing, the IT made its findings and issued its report on 2 July 2009 that the failure and/or refusal of the applicant to release the balance sum amounted to a misconduct and recommended a formal investigation against the applicant. The DC subsequently adopted the finding of the IT on 22 March 2010 and struck him off the Roll in 2010, some seven years after the complaint was lodged. Hence, this application by the applicant to be restored to the Roll. The applicant contended that he was sincerely remorseful, repentant and penitent over the matter and accepts full responsibility for what had transpired. The applicant had made attempts to contact the complainant to repay the above sum but could not trace or contact the complainant as he had left no forwarding address. The applicant also contended that his disbarment in 2010 only came to his knowledge in 2011 as he had ceased practice since 2003. The respondent however contended that the lapse of three years since the date of striking off the Roll was insufficient to show that the applicant was remorseful for his professional misconduct and was in fact truly penitent. The main issue for consideration was whether it was fair and reasonable to restore the appellant to the Roll.

Held, allowing the application and ordering the applicant to be restored to the Roll as advocate and solicitor:

(1) The application was filed almost ten years after the applicant had ceased

practiced. Furthermore the facts of the case also showed that the applicant was remorseful, repentant and penitent over the incidence. He had paid all the fines due and he was also keen to pay the monies owing to the complainant. There was no time frame stipulated under s 107 of the Legal Profession Act 1976 before a disbarred member can be restored to the Roll. In this particular case therefore it was not too early to consider whether he was a fit and proper person to resume practice as there was a lapse of ten years since he ceased practice and three years after he was struck off the Roll (see para 22).

(2) The facts of the case also show that the applicant was truly penitent and regretted for what had happened. He was prepared to pay the RM16,500 to the complainant. However, the complainant left no forwarding address and could not be traced. The applicant was even prepared to hand over the money to the respondent. In the circumstances, it was fair and reasonable for the applicant to be restored to the Roll (see paras 23 & 25).

[Bahasa Malaysia summary

Pemohon, peguambela dan peguamcara, telah menubuhkan amalannya sendiri di bawah nama dan menggelar sebagai Tetuan PS Sebastian & Co tetapi telah tamat amalan pada tahun 2003. Dalam permohonan ini, seorang yang bernama Ramasamy a/I Rajagopal ('pengadu') membuat laporan kepada Jawatankuasa Tatatertib ('JT') melalui surat bertarikh 23 Jun 2003 kerana pemohon gagal untuk membayar sejumlah penyelesaian sebanyak RM16,500, sebagai pampasan yang diawardkan kepada pengadu. Tribunal siasatan ('TS') menghantar notis pendengaran pada tahun 2005 kepada alamat lama pemohon di Pulau Pinang. Walau bagaimanapun, memandangkan pemohon tidak hadir pada pendengaran tersebut, TS membuat dapatannya dan mengeluarkan laporannya pada 2 Julai 2009 bahawa kegagalan dan/atau keengganan pemohon untuk membayar baki jumlah merupakan salah laku dan mencadangkan siasatan rasmi terhadap pemohon. JT kemudiannya mengguna dapatan TS pada 22 Mac 2010 dan menyingkirkannya daripada Daftarai pada tahun 2010, tujuh tahun kemudian selepas aduan dilaporkan. Maka, permohonan oleh pemohon ini untuk dikembalikan kepada Daftarai. Pemohon berhujah bahawa dia ikhlas sesal, kesal dan insaf ke atas perkara tersebut dan menerima kesemua tanggungjawab atas apa yang telah terjadi. Pemohon telah membuat percubaan untuk berhubung dengan pengadu memandangkan dia tidak meninggalkan alamat penghantaran semula. Pemohon juga berhujah bahawa pemecatannya pada tahun 2010 hanya diketahuinya pada tahun 2011 memandangkan dia tamat amalan semenjak tahun 2003. Responden walau bagaimanapun berhujah bahawa masa luput tiga tahun semenjak tarikh penyingkiran daripada Daftarai adalah tidak mencukupi untuk menunjukkan pemohon sesal untuk salah laku profesionalnya dan benar-benar insaf. Isu utama untuk pertimbangan adalah

A sama ada ia adalah adil dan munasabah untuk mengembalikan perayu kepada Daftarai.

Diputuskan, membenarkan permohonan dan memerintahkan pemohon dikembalikan kepada Daftarai sebagai peguambela dan penguamcara:

B (1) Permohonan difailkan hampir sepuluh tahun selepas pemohon tamat amalan. Selanjutnya fakta kes juga menunjukkan bahawa pemohon sesal, kesal dan insaf terhadap kejadian tersebut. Dia telah membayar kesemua denda yang patut dibayar dan dia juga ingin membayar wang yang terhutang kepada pengadu. Tidak terdapat tempoh masa yang ditetapkan C di bawah s 107 Akta Profesion Undang-Undang 1976 sebelum ahli yang dipecat boleh dikembalikan jawatan kepada Daftarai. Dalam kes ini oleh itu adalah tidak terlalu awal untuk mempertimbangkan sama ada dia adalah seorang yang sepatutnya untuk menyambung semula amalan memandangkan terdapat tempoh luput sepuluh tahun semenjak dia D meninggalkan amalan dan tiga tahun selepas dia dibatalkan daripada Daftarai (lihat perenggan 23).

(2) Fakta kes juga menunjukkan bahawa pemohon benar-benar insaf dan menyesal terhadap apa yang terjadi. Dia bersedia untuk membayar E sebanyak RM16,500 kepada pengadu. Walau bagaimanapun, pengadu tidak meninggalkan alamat penghantaran semula dan tidak dapat dijejaki. Pemohon juga bersedia untuk menyerahkan wang tersebut kepada responden. Dalam keadaan ini, adalah adil dan munasabah untuk pemohon dikembalikan kepada Daftarai (lihat perenggan 23 & 25).]

F

Notes

For cases on restoration to the Roll, see 9 *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1911–1913.

G **Cases referred to**

Chan Chow Wang v Malaysian Bar [1986] 2 MLJ 159; [1986] 1 LNS 94 (refd)

Teoh Hooi Leong v Bar Council Malaysia [1991] 2 MLJ 190; [1991] 2 CLJ 1117; [1991] 1 CLJ (Rep) 451, SC (refd)

H *Thavananthan a/l Balasubramaniam v Majlis Peguam Negara* [2010] 3 MLJ 316; [2009] 6 CLJ 217, FC (refd)

Legislation referred to

Legal Profession Act 1976 s 107

I Legal Profession (Disciplinary Proceedings) Investigating Tribunal and Disciplinary Committee Rules 1994 r 22

Watson Peters (Watson Peters & Mohd Fuad) for the applicant/respondent.

Christopher Lai King Lung (Chris Lai & Yap & Partners) for the respondent/appellant.

Hasnah Hashim J:

ENCLOSURE 1

[1] Enclosure 1 is an application before three judges by one Patrick Samuel a/l Joseph Sebastian (the applicant) to be restored to the Roll of Advocates and Solicitors pursuant to s 107 of the Legal Profession Act 1976 ('LPA'). The applicant had been struck off the Roll vide order of the disciplinary board dated 20 November 2010.

BACKGROUND FACTS

[2] The applicant obtained his law degree from University of London on 1 August 1988 and was admitted as an advocate and solicitor of the High Court of Malaysia on 21 August 1992. He practiced law in Pulau Pinang from date of his admission until about early 2003 when he ceased practice because of some personal issues. He had set up his own practice under the name and style of Messrs PS Sebastian & Co. On 23 June 2003 a complaint was lodged at the Advocate and Solicitors Disciplinary Board by one Ramasamy a/l Rajagopal ('the complainant') against the applicant for failure to release the settlement sum of compensation awarded to the complainant in the sum of RM16,500.

[3] Sometime in 2002 the complainant had approached the applicant with a view to seek ex-gratia compensation over the demolition of a squatter house in Permatang Pauh, Penang. The applicant successfully negotiated a settlement of RM25,000. The said ex-gratia payment would only be paid upon proof of demolition of the said squatter house and the removal of all the materials on the said land.

[4] The fees (inclusive of disbursement) of RM5,000 was agreed to by the complainant and the applicant. The sum of RM25,000 being the 10% of the compensation sum was paid by the landowner and received by the complainant out of which a sum of RM1,000 was paid to the applicant as partial legal fees. The balance amounting to RM22,500 was paid by the landowner to the applicant. According to the complainant the applicant refused and failed to release the balance compensation sum despite repeated reminders.

[5] The applicant issued a cheque for a sum of RM21,500 in favour of the complainant but the said cheque was dishonoured as the client's account was closed. Subsequently, the applicant issued another cheque for the sum of RM5,000 in favour of the complainant which was duly cleared. The

complainant repeatedly requested for the applicant to pay the balance sum amounting to RM16,500 but the applicant failed to do so.

[6] Due to failure of the applicant to pay the balance sum the complainant lodged a complaint with the disciplinary committee vide a letter dated 23 June 2003. The disciplinary committee then wrote a letter to the applicant seeking for an explanation. The applicant responded and requested the disciplinary committee to request the complainant to sign an indemnity letter upon which the balance would be paid. However, the complainant refused to do so.

[7] By a letter dated 10 May 2005 the disciplinary committee wrote to the applicant notifying that an Investigating Tribunal had been appointed to investigate the complaint. The letter was however sent to the applicant's former address in Penang. The investigating tribunal presided where the complainant was present but the applicant was absent as he said he did not receive notice of the meetings as he had moved to Kuala Lumpur sometime in 2005.

[8] The investigating tribunal found that the failure and/or refusal of the applicant to release the balance sum amounted to a misconduct and recommended a formal investigation against the applicant. The report of the Tribunal was dated 2 July 2009.

[9] The disciplinary committee adopted the finding of the Tribunal Investigation on 22 March 2010 and recommended that the applicant be struck off the Roll pursuant to r 22 of the Legal Profession (Disciplinary Proceedings) Investigating Tribunal and Disciplinary Committee Rules 1994. The applicant was then struck off the Roll on 20 November 2010.

THE APPLICANT'S CASE

[10] It is submitted by learned counsel for the applicant as follows:

(a) the applicant is sincerely remorseful, repentant and penitent over the matter and accepts full responsibility for what had transpired. The applicant had sometime in 2012 approached the disciplinary board and paid all the outstanding fines of RM7,000;

(b) the applicant had made attempts to contact the complainant to repay the sum of RM16,500. Unfortunately the complainant could not be traced or contacted as he has left no forwarding address. The disciplinary committee had also failed in their attempts to locate and contact the complainant. The applicant is prepared to hand over the money to the disciplinary board. the respondent was however reluctant to accept the said sum as it was not prepared to be the stakeholder or trustee;

(c) the applicant had ceased practice since 2003 and was disbarred only in 2010;

(d) the investigating tribunal only made its findings in 2009 and it was only in 2011 that the applicant came to know of the findings of the disciplinary committee; and

(e) The applicant is a fit and proper person to be restored to the Roll. No criminal element in what he had done.

THE RESPONDENT'S CASE

[11] On behalf of the Bar Council it was argued as follows:

Failure to furnish proof of restitution

[12] It is the submission of the respondent that the fixed sum of RM16,500 has been kept by the applicant since 2003. It is further submitted that the applicant must takes steps to make full restitution and to refund the said amount to the complainant. The applicant must therefore satisfy the court that he had in fact made efforts to fully refund the payment to the complainant and furnish proof of restitution. In the instant case it is submitted by learned counsel for the respondent that the statutory declaration by the applicant failed to show that sufficient attempts were made by the applicant to contact the complaint and to refund the said sum. Therefore there is no proof of restitution with the fullest of effort made.

Lapse of three years

[13] The lapse of three years since the date of striking off was insufficient to show that the applicant was remorseful for his professional misconduct and truly penitent. It is submitted by learned counsel for the respondent that it is still too early to ascertain any changes in character of the applicant and whether he is a fit and proper person to resume practice. There is also no evidence to suggest that the applicant is truly penitent or has repented. There are five complaints lodged with the Disciplinary Committee against the applicant and the fine of RM7,000 was only settled quite recently.

Public interest and the profession

[14] It is argued that it is in the public interest and the legal profession

generally that the applicant should not be restored due to his misconduct.

DECISION

[15] Section 107 of the Legal Profession Act 1976 ('LPA') provides:

> The High Court may, if it thinks fair and reasonable, at any time order the Registrar to restore to the roll the name of an advocate and solicitor which has been removed from, or struck off, the roll. (2) Any application that the name of an advocate and solicitor be restored to the roll shall be by originating motion supported by affidavit, before High Court.
>
> (3) Notice of the motion shall be served on the Bar Council which shall be represented at the hearing of the motion and shall place before the court a report which shall include copies of the record of any proceedings as the result of which the name of the advocate and solicitor was removed from, or struck off, the roll and a statement of any facts which have occurred since the name of the advocate and solicitor was removed from, or struck off, the roll and which in the opinion of the Bar Council or any member of it are relevant to be considered or to be investigated in connection with the application.
>
> (4) In the exercise of its jurisdiction under this section, the High Court shall comprise three judges.
>
> (5) Any party aggrieved by the decision of the High Court shall have a right of appeal to the Federal Court.

[16] The main issue for consideration is whether it is fair and reasonable to restore the appellant to the Roll. It was held by the Supreme Court in in the case of *Teoh Hooi Leong v Bar Council Malaysia* [1991] 2 MLJ 190; [1991] 2 CLJ 1117; [1991] 1 CLJ (Rep) 451 that the word 'fair' expressly provided in s 107 of the LPA means:

> … that the decision must be fair to members of the public, to the court and last but not least to the advocate and solicitor concerned. To be reasonable the decision must be based on reasonable grounds and be supported by cogent evidence and not one based on conjecture or speculation.

[17] The Supreme Court further explained that:

> A conviction should not be regarded in every case as a permanent unfitness. Disbarment is not necessarily intended to be permanent but that a heavy burden lay upon an applicant to show that he is now a fit and proper person to have his named restored to the roll. The lapse of time since the conviction is thus a material consideration. It is true that there should be strong disinclination to re-admit to the profession an advocate and solicitor who had been guilty of improper conduct. The principle that once a solicitor has been struck off the roll for dishonesty he cannot be restored unless there are exceptional circumstances should no longer apply in

absolute terms. If an advocate and solicitor lives a blameless life and there is evidence that he has rehabilitated himself generally and there are members of the profession who can vouch to this change, that may overcome the initial misconduct.

[18] Therefore the duty of the court in this application to restore to the Roll is to exercise its discretion having regard to the materials available before it and the particular facts of the case. Harun J (as he then was) in *Chan Chow Wang v Malaysian Bar* [1986] 2 MLJ 159; [1986] 1 LNS 94 said:

> … the Court has a duty to litigants and to the legal profession to ensure that such persons are of the highest integrity and honour. The Court must also be satisfied, in the public interest, that the applicant is not likely to repeat these offences if he is re-admitted. The onus is therefore on the applicant to show that:
>
> (a) there has been such a change in his character as to make him a fit and proper person to resume practice at the Bar,
>
> (b) he is truly penitent; and
>
> (c) he has made restitution.

[19] Justice Zulkefli FCJ (now CJ Malaya) in *Thavananthan a/l Balasubramaniam v Majlis Peguam Negara* [2010] 3 MLJ 316; [2009] 6 CLJ 217 observed at p 323 (MLJ); p 226 (CLJ):

> The main issue for consideration in this appeal is whether it is fair and reasonable to restore the appellant to the roll. Following from there is the question as to how long the appellant shall wait from the time he was struck off the roll until he is allowed to apply to be restored to the roll. I am of the view that each case must be considered on its own special factual circumstances bearing in mind there is no time frame stipulated under s 107 of the LPA before a disbarred member can be restored to the roll. I am also of the view that the sentences meted out on other similar comparable cases to the appellant's case should be taken into consideration in determining whether it is fair and reasonable to restore the appellant to the roll.

[20] In the instant application the complainant lodged the complaint with the disciplinary committee vide a letter dated 23 June 2003. The applicant, however had already ceased practice in 2003. The investigation tribunal only sent notice of hearing in 2005 and the tribunal made its findings and issued its report on 2 July 2009. The disciplinary committee subsequently adopted the finding of the tribunal investigation only on 22 March 2010. This was seven years after the complaint was lodged.

[21] It is argued by learned counsel for the respondent that the lapse of three years since the date of striking off the Roll was insufficient to show that the applicant is remorseful for his professional misconduct and is in fact truly penitent.

[22] Based on the facts before us the applicant had in fact ceased practice in 2003 and the disciplinary committee only struck him off the Roll in 2010, seven years after the complaint was lodged. The application was filed almost ten years after the applicant has ceased practiced. Furthermore the facts of the case also show that the applicant is remorseful repentant and penitent over the incidence. He has paid all the fines due and he is also keen to pay the monies owing to the complainant. There is no time frame stipulated under s 107 of the LPA before a disbarred member can be restored to the Roll. In this particular case therefore it is not too early to consider whether he is a fit and proper person to resume practice as there is a lapse of ten years since he ceased practice and three years after he was struck off the Roll.

[23] The facts of case also show that the applicant is truly penitent and regrets what has happened. He is prepared to pay the RM16,500 to the complainant. However, the complainant left no forwarding address and cannot be traced. The applicant is even prepared to hand over the money to the respondent.

[24] Justice Zulkifli, FCJ in *Thavananthan*'s case opined:

> Disbarment is not necessarily intended to be permanent. It is for the appellant in this case to show that he is now a fit and proper person to have his name restored to the roll.

CONCLUSION

[25] In the circumstances, and for the reasons stated, I have come to the view that it is fair and reasonable for the applicant to be restored to the Roll. Accordingly, the registrar is ordered to restore to the Roll the applicant as advocate and solicitor. It is also ordered that the sum of RM16,500 be paid into the respondent's compensation fund. It is further ordered that the applicant advertise in the English, Bahasa Malaysia and Tamil newspapers two weeks from the deposit of the said sum. Parties to bear their own costs.

[26] Finally, my learned brother and sister, Zakaria Sam J and Zaleha Yusuf J,

have seen this judgment in draft and have expressed their agreement with it. This judgment will therefore constitute the unanimous judgment of the court.

Application allowed and applicant ordered to be restored to the Roll as advocate and solicitor.

Reported by Kanesh Sundrum